



October 3, 2001

Ms. Ruth H. Soucy
Deputy General Counsel
Open Government Section
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2001-4437

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152736.

The Comptroller of Public Accounts (the "comptroller") received a request for "information related to the [comptroller's] hiring of outside investment managers to manage or invest funds that the state has received under the terms of the state's 1998 settlement of its lawsuit against the tobacco industry."¹ You state that you are providing the requestor with access to some of the requested information. You claim, however, that some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state that the requested information may contain proprietary information that is protected from disclosure under section 552.110 of the Government Code and that you have submitted this request for a decision in order to give representatives of the third parties the opportunity to submit arguments against release of such information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits

¹We note that the requestor subsequently modified his request to exclude third parties' e-mail addresses. As such e-mail addresses are not responsive to this request, we assume they will not be released. Therefore, we do not address such information in the submitted documents.

governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you claim and the submitted third party arguments, and we have reviewed the submitted information.²

We must first address the comptroller's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). You acknowledge that you failed to submit the third party information that you claim may be excepted under section 552.110 within the fifteen business day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). In this case, we believe that the interests of third parties present a compelling reason to overcome the presumption that the third party information is public. Consequently, we will consider the arguments submitted by those parties.

An interested third party is allowed 10 business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received arguments for withholding the requested information from the following third parties: Barclays Global Investors ("Barclays"), Columbia Partners, L.L.C. ("Columbia"), Davis Hamilton Jackson & Associates, L.P. ("Davis"), Fayez Sarofim & Co. ("Fayez Sarofim"), and Lazard Asset Management ("Lazard"). The remaining third parties have not submitted to this office their

²You indicate that you have submitted a representative sample of the information you seek to withhold under sections 552.107 and 552.111. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

reasons explaining why the submitted information should not be released. We thus have no basis for concluding that any of the requested information relating to those entities must be withheld from disclosure. See Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Therefore, the comptroller must release the requested information relating to those entities that did not submit arguments.

Five of the affected third parties have submitted arguments for withholding the requested information under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;

- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing the arguments submitted by Davis, we conclude that it has not established how its information comes within either branch of section 552.110. Accordingly, we conclude that the comptroller may not withhold Davis' information under section 552.110 of the Government Code.

Further, although Columbia argues that the "organization, format and style" of its proposal and supplement, as well as the contents of its proposal, constitute trade secrets, we conclude that Columbia has not demonstrated that any portion of its proposal or supplement is excepted from disclosure under section 552.110(a). We conclude, however, that Columbia has established the applicability of section 552.110(b) to the client names listed in its proposal and supplement. Accordingly, the comptroller must withhold the information we have marked in Columbia's proposal and supplement under section 552.110(b) of the Government Code. The remaining information in Columbia's proposal and supplement must be released.

- 4 Similarly, based on Fayez Sarofim's arguments and our review of the submitted information, we believe that Fayez Sarofim has demonstrated that release of the information it seeks to withhold would cause it substantial competitive harm. Therefore, the comptroller must withhold the information we have marked in Fayez Sarofim's proposal under section 552.110(b) of the Government Code. The remaining information in Fayez Sarofim's proposal must be released.

Barclays argues that portions of its two proposals are excepted under one or both branches of section 552.110. After reviewing the information at issue and Barclays' arguments, we conclude that Barclays has established the applicability of sections 552.110(a) and/or 552.110(b) to much of the information in both its proposals. Therefore, the comptroller must withhold the information we have marked in Barclays' proposals under section 552.110.³ The remaining information in both of Barclays' proposals must be released.

Lazard argues that portions of its proposal are excepted under both branches of section 552.110.⁴ After reviewing the information at issue and Lazard's arguments, we conclude that Lazard has established the applicability of sections 552.110(a) and/or 552.110(b) to information about its investment process, its client list, and its employee list.⁵ We have accordingly marked the information that the comptroller must withhold from disclosure under section 552.110. We note, however, that although Lazard states that its response includes "a sample portfolio statement, a sample client reporting package, performance information, . . . a firm organization chart" and "information about commission rates, trading team members, Lazard's continuity business plan . . . , and Lazard's insurance coverage" and generally asserts that this information constitutes proprietary commercial information, Lazard does not provide specific factual evidence in support of this assertion. We conclude that Lazard has not demonstrated that this information is excepted under either branch of section 552.110. Therefore, the comptroller may not withhold this information from disclosure under section 552.110. The unmarked information in Lazard's proposal must be released.

We note that some of the submitted information contains social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from

³ We note that some of the employee names that we have marked to be withheld may be listed in Barclays' Form ADV, which is publicly available through the Securities and Exchange Commission. Therefore, as such information is publicly available, any employee names that are listed in Barclays' Form ADV may not be withheld here under section 552.110 and must be released.

⁴ Lazard submitted a copy of the information it believed to be responsive to the request, which differs in some respects from the information of Lazard that the comptroller submitted. This decision addresses the copy that the comptroller submitted.

⁵ We note that some of the employee names that we have marked to be withheld may be listed in Lazard's Form ADV, which is publicly available through the Securities and Exchange Commission. Therefore, as such information is publicly available, any employee names that are listed in Lazard's Form ADV may not be withheld here under section 552.110 and must be released.

disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the comptroller pursuant to any provision of law enacted on or after October 1, 1990.

We also note that some of the submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

We now turn to the exceptions raised by the comptroller. Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. We agree that the information you have marked reflects a client confidence. The comptroller may therefore withhold the information you have marked under section 552.107.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations,

opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision 615 at 5-6. An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission. Open Records Decision 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision 615 at 4-5. This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). We have marked the information that the comptroller may withhold under section 552.111.

We note that some of the information in the Asset Consulting Group, Inc. binder, which you seek to withhold under 552.111, appears to be identical to some of the information sought to be withheld by the third parties under section 552.110. Thus, although such information may not be withheld under section 552.111, any information that we have previously concluded must be withheld under section 552.110 must likewise be withheld from the Asset Consulting Group, Inc. binder.

To summarize, we conclude that: (1) the comptroller must withhold the information we have marked in Columbia's proposal and supplement under section 552.110(b); (2) the comptroller must withhold the information we have marked in Fayez Sarofim's proposal under section 552.110(b); (3) the comptroller must withhold the information we have marked in both of Barclays' proposals under section 552.110; (4) the comptroller must withhold the information we marked in Lazard's proposal under section 552.110; (5) prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the comptroller pursuant to any provision of law enacted on or after October 1, 1990; (6) while the comptroller must allow inspection of copyrighted information not otherwise excepted from disclosure, the comptroller need not furnish copies of such information to the requestor; (7) the comptroller may withhold the information you have marked under section 552.107; (8) we have marked the information that the comptroller may withhold under section 552.111; and (9) any information that we have previously concluded must be withheld under section 552.110 must likewise be withheld from the Asset Consulting Group, Inc. binder. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must

• appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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KAE/sdk

Ref: ID# 152736

Enc: Marked documents

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All 305 Parties